IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 22, 2003 Session

STATE OF TENNESSEE v. CHARLES RAY SHORTT

Appeal from the Criminal Court for Hawkins County
No. 8024 James E. Beckner, Judge

No. E2002-02184-CCA-R3-CD
December 18, 2003

The defendant, Charles Ray Shortt, was convicted of manufacturing marijuana, a Class D felony, and possession of drug paraphernalia, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-17-417(a)(1), (g)(2), 39-17-425. The trial court sentenced the defendant to concurrent terms of two years and eleven months, twenty-nine days, respectively. In this appeal as of right, the defendant asserts (1) that the trial court erred by denying his motion to suppress evidence of the drugs and paraphernalia; (2) that the evidence was insufficient to support the conviction for manufacturing marijuana; and (3) that the trial court erred by denying an alternative sentence. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA MCGEE OGLE, JJ., joined.

Robert W. White, Maryville, Tennessee, for the appellant, Charles Ray Shortt.

Paul G. Summers, Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General; and Jack Marecic, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On September 18, 2001, while piloting a helicopter over the Poor Valley community of Hawkins County, sheriff's department Lieutenant Bob Crumley observed what he believed to be several marijuana plants growing on property owned by the defendant. After obtaining a search warrant based upon this surveillance, officers seized seventeen marijuana plants and scales, plastic baggies, and other paraphernalia. The defendant was indicted for manufacture of marijuana and possession of drug paraphernalia.

At trial, Lieutenant Crumley testified that as part of his duties, he routinely flew a helicopter to assist with manhunts, marijuana eradication, and crime scene photography. He recalled that when

he first observed the marijuana plants on the defendant's property, he and Deputy Gary Murrell, who was with him, had just taken some photographs in Stanley Valley and were flying over the lower portion of Poor Valley in search of some stolen property. Because of the September 11 attacks on the World Trade Center, which had taken place one week earlier, a flight plan was required and their air time had been restricted. The lieutenant recalled that he had to maintain an altitude of at least 3,000 feet above sea level, or approximately 1,700 feet above the ground, in order to remain in contact with the Tri-Cities airport. He explained that because he was not on a marijuana eradication mission, a ground crew was not at his disposal and so he had to arrange for Detective Brad Depew to meet him near the defendant's property. When the detective arrived, Lieutenant Crumley provided directions to the marijuana plants.

Detective Depew, who arrived at the defendant's property approximately twenty minutes after receiving Lieutenant Crumley's radio call, walked to a double-wide mobile home, identified himself, and knocked on the door several times but received no answer. According to Detective Depew, Lieutenant Crumley then radioed that he had to leave the area due to his limited flight time and provided directions to the marijuana plants, which were located in a field across a low, three-strand electric fence. Several game chickens and coops were located nearby. The detective found the plants, which ranged from two-and-one-half to eight feet in height. Some were inside the electric fence and some just outside near the edge of the field, approximately 100 to 120 feet from the double-wide trailer. By the time Detective Depew returned to the double-wide trailer, Captain Ronnie Lawson had arrived at the scene to assist. Each knocked on the door several times and identified themselves but received no answer. Detective Depew, who had seen the blinds covering one of the trailer's windows move, testified that when he turned the doorknob and allowed the door, which was not locked, to swing open, he encountered the defendant's wife, Paula Shortt. After explaining that he had found marijuana on the property, he requested permission to conduct a search. She declined. The detective then placed Ms. Shortt under arrest and Captain Lawson left to acquire a search warrant. Upon Captain Lawson's return with the warrant, Detective Depew removed seventeen marijuana plants from the defendant's property. After drying and packaging the plants, he shipped them to the TBI Crime Laboratory, which found the weight of the marijuana to be 658.5 grams. Detective Depew acknowledged that he drew his weapon when he saw Ms. Shortt standing behind a wall.

Deputy Murrell, who testified that the helicopter was at an altitude of roughly 2,000 feet above ground when Lieutenant Crumley first observed the marijuana plants, returned by car to the defendant's property to assist with execution of the search warrant. He confirmed that the officers at the scene discovered an outbuilding with tool boxes containing drying marijuana, scales, hemostats, plastic baggies, rolling papers, hand-rolled marijuana cigarettes that had been burned, and plant fertilizer.

Kenneth Myers, a private investigator, testified on behalf of the defense that he had arranged for a helicopter flight over the defendant's property and had taken aerial photographs from an altitude of 3000 feet. He introduced the photographs as well as a videotape made during his flight.

Nancy Gibson, a neighbor of the defendant, testified that she had known the defendant for eighteen years but had never known him to grow marijuana. Earl Rangley, Jr., another neighbor, testified that he was also unaware that the defendant had marijuana on his property.

I

Initially, the defendant contends that the trial court erred by denying his motion to suppress evidence of the drugs and paraphernalia seized by the deputies. He argues that the officers' observation from the helicopter and Detective Depew's initial entry qualified as warrantless searches conducted in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 7, of the Tennessee Constitution.

Prior to trial, the defendant filed a motion to suppress. At the hearing on the motion, Lieutenant Crumley explained that he was returning from a "photo flight" in the upper end of Stanley Valley when he saw the marijuana plants on what he later learned was the defendant's property. He estimated that he was flying at an altitude of approximately 3,000 feet when he first observed the plants, specifically recalling that airspace had been restricted as a result of the September 11 World Trade Center attack and that he was required to stay in contact with the Tri-City control tower. The lieutenant testified that he did not land the helicopter on the defendant's property and contended that he flew no lower than 300 feet while he was by radio directing officers on the ground to the location of the marijuana plants.

Deputy Murrell, who was not a trained pilot, estimated that the altitude of the helicopter while flying over Poor Valley was 1,800 to 2,000 feet. He also contended that after having seen the marijuana plants, the helicopter got no lower than 200 to 300 feet off the ground.

Detective Depew testified at the suppression hearing that he had identified himself as a deputy sheriff and knocked on the front door of the double-wide mobile home for two to three minutes, receiving no answer. He described how Lieutenant Crumley, who was in the air above the property, directed him to the marijuana, leading him into a field, across a footbridge, and to a "very short, three-strand electric fence." He found five marijuana plants outside the fence and twelve inside. Detective Depew estimated that the helicopter was at an altitude of 200 to 250 feet at the time. According to the detective, it was only after he knocked, identified himself, and waited without answer that he opened the door and found the defendant's wife inside. Detective Depew stated that he then secured the residence and placed Ms. Shortt in custody. He contended that there was no damage to or disruption of the defendant's property as a result of the helicopter's flight.

Paula Shortt testified that she heard a loud helicopter fly over at approximately 1:30 p.m. on the afternoon of September 18. She stated that she had locked the front door and taken a fifteen- to twenty-minute shower before she heard her dogs barking and a helicopter that sounded "a lot louder." Ms. Shortt contended that when she looked out the window, she saw police cars in the driveway and a helicopter just above a poplar tree, which she estimated to be sixty to sixty-five feet in height. She claimed that she then dressed and was placing a telephone call to her husband when

Detective Depew came in the front door with his gun drawn. Ms. Shortt acknowledged that she had not seen anything on the property blown over by the wind generated by the helicopter.

Nancy Gibson, who lived approximately two to three hundred feet from the residence of the defendant, testified for the defense that the helicopter "sounded like it was going to take the roof off the house." She claimed that the reverberations jarred the pictures and other items she had hanging on her walls. Ms. Gibson contended that the helicopter, at a height of fifty to sixty feet, "was either crashing or trying to land, it was so low."

Defense witness Earl Rangley, Jr., testified that his residence is located approximately two-tenths of a mile from that of the defendant. He remembered that the helicopter "come down the valley and circled around" and then "started going around over our houses." Rangely estimated that the helicopter was flying no more than fifty to sixty feet above the ground. Kathleen Collins, who lived on the same road as the defendant, testified that the helicopter flew over her residence, frightening her chickens, and traveled in the vicinity of Rangley's residence. Using a balloon as a measurement aid, Ms. Collins and some of her neighbors estimated the helicopter's altitude at fifty-four feet above the ground.

At the conclusion of the suppression hearing, the trial court denied the motion, holding as follows:

> Now, I find that the credible evidence in this case is . . . [that] Lieutenant Crumley was flying a helicopter over a thousand feet from the ground, not looking for the defendant's property or to determine if the defendant was growing marijuana, but in flying another mission . . . in air space in which there is no right of privacy of the person[,] where they have a right to be and can observe whatever is to be observed on the ground.
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> Under the plain view doctrine, the helicopter pilot, if he could have done so safely, could have landed on the ground and seized the marijuana because he was where he had a right to be, there was no right of privacy, he could see contraband, he had a right to seize it, and that excuses the warrant requirement. He, apparently, couldn't safely land on the ground.
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> And there were exigent circumstances there, without any question because had he left the scene, had he just marked it . . . and gone off, once he had lowered himself and made it obvious – and, apparently, it was obvious to people around there that helicopters look for marijuana in that area; at least that's what the evidence was – it's very likely that marijuana would not have been there when somebody came back, if he'd left it and let it get out of his sight and gone off somewhere else. So he kept there, which he had a right to do.

The standard of review applicable to suppression issues is well established. When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23.

In Katz v. United States, 389 U.S. 347, 351 (1967), the United States Supreme Court held that because the fourth amendment protects people rather than places, areas exposed to the public are not subject to constitutional protections. "Accordingly, when evaluating whether a particular defendant's Fourth Amendment rights have been violated, we look to two inquiries: (1) whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," and (2) whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" State v. Ross, 49 S.W.3d 833, 840 (Tenn. 2001) (citations and footnote omitted). In State v. Roode, 643 S.W.2d 651 (Tenn. 1982), officers seized marijuana plants found on the defendant's property after initial observation during a helicopter overflight. The defendant, who was convicted of possession of marijuana with intent to sell, argued that the helicopter surveillance violated his constitutionally protected reasonable expectation of privacy. On appeal, the conviction was affirmed by both this court and our supreme court, which held that because the defendant had no reasonable expectation of privacy, the helicopter overflight did not result in a constitutional violation:

> [T]here is nothing in the record to indicate that appellant had a reasonable expectation of immunity from overflight. While appellant's farm is located in a remote section of Cannon County, it lies near a federally designated flight path. Lt. Dover was attempting to follow this flight path in returning to his home base in Nashville, when he saw the fields of marijuana under cultivation. Lt. Dover was in a place where he had a right to be when he observed criminal activity, clearly recognizable as such, on the property of appellant. This being so, his aerial observation did not constitute a "search" as contemplated by the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution.

Id. at 651 (citation omitted).

In California v. Ciraolo, 476 U.S. 207 (1986), police received an anonymous telephone tip that the defendant was growing marijuana in his backyard, which was surrounded by a six-foot outer fence and a ten-foot inner fence. Officers secured a private plane and, flying at an altitude of 1000 feet, identified marijuana plants on the property. Later, the officers obtained a search warrant and

seized a total of seventy-three plants. The trial court initially denied the defendant's motion to suppress, but the California court of appeals reversed, finding that the warrantless aerial observation violated the Fourth Amendment. When the California supreme court denied review, the United States Supreme Court granted certiorari and reversed, concluding that the defendant had no reasonable expectation of privacy:

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."
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> The observations by [the officers] in this case took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that [the defendant's] expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.
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> In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

476 U.S. at 216-17, 218 (citations omitted); see also State v. Prier, 725 S.W.2d 667, 671 (Tenn. 1987) (adopting the holding in Ciraolo and stating that no greater protection is afforded by the Tennessee Constitution).

In State v. William D. Ware and Virginia Ware, No. 01C01-9803-CC-00129 (Tenn. Crim. App., at Nashville, June 11, 1999), the defendants, who were convicted of manufacturing marijuana and LSD, asserted on appeal that helicopter surveillance of their property from an altitude of 300 feet had resulted in a violation of their constitutional rights. Testimony showed that officers had initially observed marijuana plants on the defendants' property while flying over by helicopter at an altitude of 900 feet. For confirmation, they had then flown over at an altitude of 300 feet. The trial court

denied the motion to suppress and, on appeal, this court held that the officers' observation of the marijuana plants from the helicopter did not constitute an unreasonable search:

> We conclude that under Ciraolo . . ., [the defendants] had no reasonable expectation that the marijuana on their property was protected from observation by the police from a helicopter flying at an altitude of 300 feet. First, the police were operating the helicopter at a permissible altitude. Second, there is nothing in the record to suggest that helicopter overflights at 300 feet are sufficiently rare in rural Wayne County so as to support [the defendants'] theory that they reasonably believed that their property would not be observed by helicopter. In fact, Ms. Ware testified at the suppression hearing that before the helicopter observation at issue here, she had already received notice from Champion Paper Company that helicopters would be in the area to spray during August and September. Further, Ms. Ware testified that part of the reason the marijuana was covered with cheesecloth was because in addition to the Champion helicopters, there might be "marijuana helicopter[s]" in the area. Third, there is no evidence in the record that the police helicopter interfered with [the defendants'] use of their property. Finally, there is no evidence in the record that the helicopter surveillance at an altitude of 300 feet caused any undue noise, or any wind, dust, or threat of injury. Under these circumstances, we conclude that the helicopter surveillance at 300 feet did not violate [the defendants'] rights under the Fourth Amendment or under Article I, Section 7. This issue is meritless.

Ware, slip op. at 7-8 (footnotes omitted).

In this case, by denying the motion to suppress, the trial court accredited the testimony of Lieutenant Crumley and Deputy Murrell that the helicopter was at an altitude of at least 1,700 feet above the ground when the lieutenant first saw the plants. Lieutenant Crumley recalled that 1,700 feet was the minimum altitude he was required to maintain in light of the restrictions on air traffic in the immediate aftermath of the September 11 terrorist attack. Thus, the officers were operating the helicopter within public navigable airspace at a permissible altitude. There is no evidence in the record that helicopter surveillance from this altitude would have interfered with the defendant's use of his property. Nor is there any evidence that such helicopter flights were rare in the vicinity of the defendant's property. Although neighbors testified that the helicopter was loud, the noise was naturally louder when the officers flew lower to the ground in order to direct Detective Depew to the marijuana plants. There was testimony from Earl Rangely that military helicopters commonly flew over that area of the valley. In our view, Lieutenant Crumley's observation of the marijuana plants from the helicopter he was piloting over Poor Valley did not amount to an unconstitutional search of the defendant's property. Thus, the defendant had no reasonable expectation that the marijuana plants on his property were protected from observation by police flying in a helicopter at an altitude of 1,700 feet.

The defendant also contends that Detective Depew's initial entry onto the curtilage of his residence was a warrantless search in violation of constitutional guidelines. The state argues that

the marijuana plants found on the defendant's property were situated beyond the curtilage of the residence and were subject to a warrantless seizure under the "open fields" doctrine.

In State v. Jennette, 706 S.W.2d 614 (Tenn. 1986), our high court affirmed the doctrine that officers do not need a warrant to enter and search "open fields:"

> "[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas. . . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"

Id. at 619 (quoting Oliver v. United States, 466 U.S. 170, 179 (1984)).

One year later, in State v. Prier, our high court affirmed the trial court's grant of a motion to suppress evidence of marijuana plants seized in a warrantless entry at the direction of an officer in a helicopter who had observed the plants during an overflight. 725 S.W.2d at 668. There were three separate patches of plants at various points on the defendant's property. The first patch was located in a pasture near a barn and some dog pens, approximately fifty feet from the defendant's residence; the second was six to seven paces from the residence on the other side of a fence; and the third was in a garden twenty-five yards from the left rear corner of the residence. In determining that the plants were within the curtilage of the residence and, therefore, not subject to the "open fields" doctrine, our supreme court discussed curtilage as follows:

> In Welch v. State, 154 Tenn. 60, 64, 289 S.W. 510, 511 (1926), the curtilage was defined as "the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes."
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> "[T]he common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home. . . . At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, . . . and therefore has been considered part of home itself for Fourth Amendment purposes. . . ."

Id. at 670 (quoting Oliver, 466 U.S. at 180).

In our view, the marijuana plants seized from the defendant's property did not fall within the curtilage of the defendant's residence and were, therefore, subject to seizure under the "open fields" doctrine. The record establishes that Detective Depew found the marijuana plants to be in five

separate groupings, the closest of which appeared to be over 120 feet from the defendant's residence. Testimony established that the area was separated from the residence by a ditch that required a footbridge to cross. The location was grown over with weeds and brush. Photographs submitted by the defense demonstrate that the location was shielded from view of the residence by trees. Given those circumstances, it is our conclusion that the marijuana plants were not found in an area associated with the "sanctity of a man's home and the privacies of life."

Moreover, entry onto the property would have been justified even if the plants had been located within the curtilage of the residence. While a warrantless search is generally presumed to be unreasonable, there are several well recognized exceptions. State v. Bartram, 925 S.W.2d 227, 229-30 (Tenn. 1996). One such exception is a warrantless search conducted pursuant to probable cause and exigent circumstances. State v. Moore, 949 S.W.2d 704, 706 (Tenn. Crim. App. 1997). The burden, however, is on the state to establish by a preponderance of the evidence that a warrantless search falls within such an exception to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

In our view, probable cause and exigent circumstances were present to justify the warrantless entry of the defendant's property and residence. The officers had probable cause to believe that there was marijuana on the defendant's property. Lieutenant Crumley testified that after he initially observed the plants, he returned at a lower altitude to confirm his observations. He was trained to locate marijuana from the air and had extensive experience doing so. Likewise, the record reflects that Detective Depew's initial entry onto the property was the result of exigent circumstances. Due to the strict flight restrictions at the time, Lieutenant Crumley's time in the air was limited. He had been required to file a flight plan with the Tri-Cities airport and was further required to report by telephone immediately upon landing the helicopter. When he observed the marijuana and contacted Detective Depew, he was able to obtain a time extension of approximately thirty minutes. There was no time for a warrant to be secured before Lieutenant Crumley had to leave the area. Moreover, Detective Depew had reason to believe that the residence was occupied. Upon his arrival, he had observed a truck in the driveway and had also seen the blinds move as though someone were looking through them while he was knocking on the door. The defendant's wife was, in fact, on the telephone in an attempt to locate the defendant because the officers were there. See Jennette, 706 S.W.2d at 617 (citing helicopter's depleted fuel and the potential for destruction of marijuana plants observed by officers as exigent circumstances). The officers were, therefore, justified in entering and securing the property before seeking a warrant.

Finally, the defendant argues that newly discovered evidence, the aerial photographs introduced by his private investigator at trial, warrants a reversal of the trial court's determination on the motion to suppress. He contends that the photos demonstrate that Lieutenant Crumley would have been unable to observe the marijuana plants from an altitude of 1,700 feet above ground.

Newly discovered evidence is evidence that the defendant could not have previously found using reasonable diligence and, to warrant relief, must have some effect other than to impeach the testimony of a witness. See State v. Singleton, 853 S.W.2d 490, 496 (Tenn. 1993); State v.

Sheffield, 676 S.W.2d 542, 554 (Tenn. 1984); State v. Goswick, 656 S.W.2d 355, 359 (Tenn. 1983); State v. Burns, 777 S.W.2d 355, 361 (Tenn. Crim. App. 1989). Because the photos could have been obtained by the defendant with reasonable diligence prior to the hearing on the motion to suppress, they do not qualify as newly discovered evidence. Additionally, they would have been offered only to impeach the testimony of Lieutenant Crumley. This issue is not a basis for reversal.

II

Next, the defendant asserts that the evidence was insufficient to support the conviction for manufacturing marijuana. He contends that because each marijuana plant was not tested individually, the state failed to prove that he possessed the requisite number of plants and argues that the facts support a conviction for simple possession, at best.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Under Tennessee Code Annotated section 39-17-417(a) (Supp. 2000), "[i]t is an offense for a defendant to knowingly . . . [m]anufacture a controlled substance . . . ." The term "manufacture" is defined by the Code as follows:

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . . .

Tenn. Code Ann. § 39-17-402 (14). Here, the defendant was charged with manufacturing seventeen marijuana plants, or "a Schedule IV controlled substance classified as marijuana consisting of ten (10) marijuana plants nor more than nineteen (19) marijuana plants, regardless of weight." Tenn. Code Ann. § 39-17-417(g)(2) (Supp. 2000).

The defendant argues that because the leafy material was pulled from the stalks and combined in one box with other seized material believed to be marijuana, "[i]t is impossible to tell from the record if even one of the plants was marijuana." He contends that in order to satisfy its burden of proof, the state would have had to test leaves from each plant individually. In denying the defendant's motion for acquittal at the close of the state's proof, the trial court stated as follows:

> The number of plants in this particular statute makes it difficult, I think, for the state to show in a case directly that each plant, or each stem, was individually tested for marijuana.
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> But in this case, given the state's evidence in its best light, . . . the officers say that they recognized, from their experience, these as marijuana plants. They were pulling them as such; they counted them and . . . there were 17 of them. The substance was tested; it was tested rather generically instead of individually, but it tested positively for marijuana.

In our view, the evidence was sufficient for a reasonable jury to find the defendant guilty of manufacturing between ten and nineteen marijuana plants. The investigating officers testified that they were trained and experienced in the identification of marijuana plants and that they believed the plants on the defendant's property to be marijuana. The stalks of seventeen plants were introduced as evidence at trial. The leaves stripped from the plants and submitted to the TBI tested positive for marijuana.[1] Although all the leafy material was combined for testing, there is no indication that there was any variation among the seventeen plants, photographs of which appeared in the record. This issue is without merit.

III

Finally, the defendant contends that the trial court erred by denying an alternative sentence. He argues that his criminal history consists only of non-violent misdemeanors and that twenty-five years had passed since his last conviction. The state asserts that the denial of alternative sentencing was proper.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v.

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[1]The defendant also asserts that the evidence was insufficient because the TBI report identified the plant substance as "marihuana" spelled with an "h" rather than a "j." This argument is meritless insofar as both spellings are acceptable references to the cannabis plant. See Tenn. Code Ann. § 39-17-402; Black's Law Dictionary 967 (6th ed. 1990).

Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are, of course, presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b) (Supp. 2000).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000); State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). The nature and circumstances of the offenses may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for Community Corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
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> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
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> (3) Persons who are convicted of nonviolent felony offenses;
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> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
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> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
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> (6) Persons who do not demonstrate a pattern of committing violent offenses; and
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> Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

At the sentencing hearing, the forty-eight-year-old defendant testified that he had been married for twenty-eight years and that his wife and two adult daughters lived at his residence. He contended that he had injured his back while working on a car in 1990 and that he began smoking marijuana when doctors were unable to recommend an effective treatment for the pain. According to the defendant, he was out of work for five years following his injury. At the time of sentencing, he was employed at M.C. South. He testified that in June of 2001 when he discovered that Excedrin Migraine pills helped with his back pain, he had stopped smoking marijuana. The defendant also claimed that he grew marijuana only for his personal use and denied that he had ever sold or delivered it to anyone.

In ordering a sentence of confinement, the trial court ruled as follows:

> [D]eterrence is a consideration in this case. The state hasn't put on proof . . ., but I can take judicial notice that drug cases are increasingly present on the docket in this county and this court, that they're a significant part of the docket, and they include marijuana cases.
>
> And I'm going to allude to State v. Hooper . . . [a]nd . . . under the guidelines of that case, a consideration if whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by desire to profit or gain from the criminal behavior. Certainly it meets that category; not necessarily the latter part but, certainly, the first.
>
> * * *
>
> And number five is whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrest or convictions. And I do find that.
>
> So I find that three of the five [Hooper] factors are present and that deterrence is a consideration for denial of alternative sentencing or probation, along with the prior record, the history of drug abuse, and the circumstances of this offense.

In State v. Hooper, 29 S.W.3d 1, 10 (Tenn. 2000), our supreme court ruled as follows:

> [W]e will presume that a trial court's decision to incarcerate a defendant based on a need for deterrence is correct so long as any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

Our high court also suggested several guiding factors for determining whether a need for deterrence is present and whether incarceration is "particularly suited" to achieve that goal:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole;
> (2) whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior;
> (3) whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case;
> (4) whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective;
> (5) whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

Id. at 10-12. Our supreme court cautioned that "because the 'science' of deterrence is imprecise at best, the trial courts should be given considerable latitude in determining whether a need for deterrence exists and whether incarceration appropriately addresses that need." Id. at 10. Our high court observed that

> [d]eterrence is a complex psychological process, and the focus on deterrence through changes in the penalty structure or sentencing behavior represents but one part of the calculus. Section 40-35-103(1)(B) recognizes this reality as the language of the statute requires only that confinement be "particularly suited" to provide a deterrent effect, and it does not require proof that incarceration "will" or "should" deter others from committing similar crimes.

Id. at 9.

In our view, the trial court did not abuse its discretion by ordering a sentence of confinement. The record reflects that although the defendant claimed that he was growing the marijuana plants for his own use, he also insisted he had stopped using marijuana some two months prior to the seizure of the plants. Moreover, the presence of the scales and plastic baggies, which would have been used for weighing and packaging marijuana, belie the defendant's assertion that he never sold or distributed the drug. Additionally, the defendant appeared to have been using marijuana for a lengthy period of time. He reported that he had been using the drug extensively until that summer and has had two prior convictions for possession of marijuana, the first of which resulted in a sentence of probation. Under these circumstances, the trial court did not err by denying alternative sentencing.

GARY R. WADE, PRESIDING JUDGE